88-1032

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

JOSEPH JUTKOFSKY,

Petitioner,

against

ALDO MAESTRI and GLORIA ZOOK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Should the applicability of judicial immunity be based upon a subjective test of whether or not the judge had knowledge that jurisdiction was exceeded?

Should the difference between an act in excess of jurisdiction as opposed to clear absence of jurisdiction be based upon a technical interpretation of subject matter jurisdiction?

Parties

The only parties to the proceeding in the United States Court of Appeals for the Second Circuit were the petitioner, Joseph Jutkofsky, and the respondents, Aldo Maestri and Gloria Zook. There are several other named defendants in the action, none of whom were parties to the proceeding in the Second Circuit, and none of whom are interested in this proceeding.

Table of Contents

Questions Presented i

Parties i

Opinions Below 1

Jurisdiction 2

Constitutional, Statutory and Regulatory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ of Certiorari 4

I. The Second Circuit decision, which establishes a subjective test for the applicability of judicial immunity, is in conflict with prior Supreme Court decisions and decisions from other Circuits 4

II. The Second Circuit decision conflicts with *Bradley v. Fisher* and creates confusion as to the difference between excess and clear absence of jurisdiction 7

Conclusion 11

Index to Appendix

	Page
Appendix A to Petition—Decision of Second Circuit Court of Appeals	1a
Appendix B to Petition—Order of Judge McAvoy	1b
Appendix C to Petition—Order for Final Judgment of Judge McAvoy	1c
Appendix D to Petition—Statutes	1d

TABLE OF AUTHORITIES

Adams v. McIlhany, 764 F.2d 294 (5th Cir. 1985), Cert. Den. 474 U.S. 1101 (1986)..... 10

Ashelman v. Pope, 793 F.2d 1072 (9th Cir. 1986).. 6,10

Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) *Passim*

Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982) .. 8

Cleavinger v. Saxner, 474 U.S. 193 (1985) 4

Green v. Maraio, 722 F.2d 1013 (2nd Cir. 1983).... 5, 8

Holloway v. Walker, 765 F.2d 517 (5th Cir. 1985), Cert. Den. 474 U.S. 1037 (1985)..... 6

Lopez v. Vanderwater, 620 F.2d 1229 (7th Cir. 1980), Cert. Den. 449 U.S. 1028 (1980)..... 8

Mullis v. U.S. Bankruptcy Court, 828 F.2d 1385 (9th Cir. 1987), Cert. Den. 108 S. Ct. 2031 (1988) 8

O'Neil v. City of Lake Oswego, 642 F.2d 367 (9th Cir. 1981) 5, 6

Stump v. Sparkman, 435 U.S. 349 (1978)... 5, 8, 10, 11

Turner v. Raynes, 611 F.2d 92 (5th Cir. 1980), Cert. Den. 449 U.S. 900 (1980)..... 9

Page

STATUTES:

28 U.S.C. Section 1254(1) 2

42 U.S.C. Section 1983..... 2

42 U.S.C. Section 1985..... 2

42 U.S.C. Section 1988..... 2

N.Y. Criminal Procedure Law Section 100.55 ..... 2, 3

N.Y. Criminal Procedure Law Section 120.30 ..... 2, 3

N.Y. Criminal Procedure Law Section 170.55 ..... 2, 3

N.Y. Penal Law Section 140.05 ..... 2, 3

N.Y. Penal Law Section 240.25 ..... 2, 3

OTHER AUTHORITY:

Black's Law Dictionary..... 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988.

JOSEPH JUTKOFSKY,

Petitioner,

against

ALDO MAESTRI and GLORIA ZOOK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated October 20, 1988, was still unreported at the time of this Petition. A copy of the opinion is attached hereto as an Appendix "A". Copies of the initial order and order for final judgment of the Northern District Court of New York, respectively dated December 17, 1987 and January 6, 1988, are also attached hereto as Appendix "B" and Appendix "C". No formal decision was issued by the Northern District Court of New York, and thus, there is no reported opinion.

Jurisdiction

The United States Court of Appeals for the Second Circuit issued and entered the decision sought to be reviewed herein on October 20, 1988. No motions to rehear or reargue the case were made, and no extensions of time for filing this petition were sought.

Jurisdiction to review the judgment in question by certiorari is conferred by Title 28 U.S.C. Section 1254(1).

Constitutional, Statutory and Regulatory Provisions Involved

This case involves the common law doctrine of judicial immunity. No constitutional or regulatory provisions are involved.

The federal statutes involved include 28 U.S.C. Section 1254(1) and 42 U.S.C. Sections 1983, 1985 and 1988.

The New York State statutes involved include N.Y. Criminal Procedure Law Sections 100.55, 120.30 and 170.55, and N.Y. Penal Law Sections 140.05 and 240.25.

Copies of the statutes are attached as Appendix "D".

Statement of the Case

Aldo Maestri and Gloria Zook, respondents, commenced an action under Title 42 U.S.C. Sections 1983, 1985 and 1988 in the United States District Court for the Northern District of New York against Joseph Jutkofsky, petitioner, and several other defendants. Respondents allege that they were deprived of their civil rights as the result of actions taken by petitioner in his role as a town

justice for the Town of Taghkanic, County of Columbia, State of New York.

In April of 1983, respondents were accused of harassment and trespass pursuant to New York Penal Law Sections 240.25(5) and 140.05 as the result of an incident allegedly occurring in the Town of Germantown, County of Columbia, State of New York. Petitioner, as a town justice, was presented with papers and requested to issue warrants for the arrest of respondents. Petitioner issued the warrants and made a bail recommendation. Petitioner also presided at one of their court appearances. While issuing warrants, recommending bail and presiding at a court proceeding involving charges of harassment and trespass were all acts within the scope of petitioner's authority as a town justice, it is alleged that petitioner exceeded his territorial jurisdiction. The incident allegedly occurred in Germantown, and petitioner's scope of authority extended only to incidents occurring within his own town, and in any adjoining town (see New York Criminal Procedure Law Sections 120.30 and 100.55). Germantown and Taghkanic, while in the same county, are not adjoining and approximately four miles apart at their closest point.

Respondents claim that petitioner must have known that he was exceeding his jurisdiction and as a result, he was acting in the clear absence of jurisdiction and not entitled to judicial immunity. Respondents claim damages stemming from spending sixteen days in jail while awaiting trial, when New York State Law permits a maximum of five days incarceration while awaiting trial on such charges. (The charges against respondents were eventually adjourned in contemplation of dismissal pursuant to New York Criminal Procedure Law Section 170.55.)

Prior to the commencement of discovery against petitioner, a motion for summary judgment was brought in the United States District Court for the Northern District of New York requesting that the case be dismissed against petitioner on the basis of judicial immunity. Petitioner argued that while his acts may have been in excess of his jurisdiction, they were not in the clear absence of jurisdiction as defined by case law. The United States District Court for the Northern District of New York granted petitioner's motion for summary judgment. Respondents appealed to the United States Court of Appeals for the Second Circuit, however, and the District Court's grant of summary judgment was reversed. The Second Circuit established a new test for the applicability of judicial immunity which includes a subjective element based upon whether or not the judge knew that the act was in the clear absence of jurisdiction. Since the Second Circuit found that petitioner must have known that he was acting without territorial jurisdiction, judicial immunity was withdrawn and summary judgment reversed.

Reasons for Granting the Writ of Certiorari

I.

The Second Circuit decision, which establishes a subjective test for the applicability of judicial immunity, is in conflict with prior Supreme Court decisions and decisions from other Circuits

Few doctrines have been more solidly established in the common law of the United States than the immunity of judges from civil liability for acts committed while acting as a judge. See *Cleavinger v. Saxner,* 474 U.S. 193, 199 (1985). Also firmly established as part of the doctrine of judicial immunity is the concept that the applicability of

the doctrine is not affected by the state of mind of the judge at the time of the act. As stated in the seminal case of *Bradley v. Fisher,* 80 U.S. (13 WALL.) 335 (1871), "(n)or can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed." *Bradley* at 347. More recently, the Supreme Court has stated that, "(a) judge will not be deprived of immunity because the action he took was . . . done maliciously". *Stump v. Sparkman,* 435 U.S. 349, 356 (1978).

This issue of inquiring into the state of mind, or intent, of a judge while committing the act forming the basis for a civil liability action was recently discussed in the case of *O'Neil v. City of Lake Oswego,* 642 F.2d 367 (9th Circuit 1981). The Ninth Circuit specifically rejected the argument that the intent of the judge was open to plaintiff's examination to determine if judicial immunity would or would not apply. "Intent, it should be noted, plays no role in the foregoing analysis." *O'Neil* at 370. Rather, the applicability of judicial immunity is decided at the outset of a case without any consideration of the state of mind or intent of the judge at the time of the underlying act. To permit plaintiffs to examine defendant-judges as to their state of mind would defeat one of the purposes behind the doctrine, which is to relieve judges from the burden of defending civil litigation suits. Even the Second Circuit Court of Appeals in a case a few years ago specifically determined that a plaintiff was not entitled to a hearing as to the defendant-judge's motivations for his actions since judicial immunity defeats a lawsuit right at the beginning before any discovery proceedings are held. *Green v. Maraio,* 722 F.2d 1013, 1018 (2d Circuit 1983).

Thus, prior case law from the United States Supreme Court has established that judicial immunity is applied

without considering the possible motive or intent of the judge when the act was performed. The Ninth Circuit, in the *O'Neil* case, *supra,* and in the case of *Ashelman v. Pope,* 793 F.2d 1072 (9th Circuit 1986), has also concluded that the intent or state of mind of the judge should have no impact on the applicabililty of judicial immunity. See *Ashelman* at 1078. Similiarly, the Fifth Circuit, in the case of *Holloway v. Walker,* 765 F.2d 517 (5th Circuit 1985), *cert. den.* 474 U.S. 1037 (1985), has also concluded that, "the ease of alleging bad faith would make a qualified 'good faith' immunity virtually worthless," *Holloway* at 522, citing *Bradley v. Fisher,* and, thus, rejected an inquiry into the state of mind of a judge for determining the applicability of judicial immunity.

Against this backgound of unified opinion that the actual subjective state of mind of the judge is of no relevance to the applicability of judicial immunity and, in fact, an inquiry into a judge's state of mind would violate the doctrine itself, the Second Circuit Court of Appeals in the case at bar has now established a test which requires that the subjective state of mind of the judge be considered. On page 7 of the unpublished opinion (Appendix "A" herein), the Second Circuit concedes that such scrutiny of a judge's state of mind is in conflict with the doctrine of judicial immunity. Immediately thereafter, however, the Second Circuit establishes a two-part test consisting of both objective and subjective elements. The second prong of the test is a "subjective element—that the judge whose actions are questioned actually knew or must have known of the jurisdictional defect" (see page 7 of opinion).

The establishment of this subjective test for the applicability of judicial immunity is in complete and utter conflict with prior Supreme Court decisions and in conflict

with other Circuit Courts of Appeals in the United States. While the *Bradley v. Fisher* case does make a reference to the knowledge of the judge that jurisdiction was exceeded (see *Bradley* at 352), it is clear from the rest of the *Bradley* decision and subsequent case law that this reference is to an objective test of knowledge, not a subjective one. Thus, the decision in the case at bar, which will be an important precedent in the area of judicial immunity, creates conflict and confusion as to the relevance of knowledge on the part of judges that their jurisdiction was exceeded. This decision could be interpreted so that an initial inquiry would have to be made in a case as to whether or not the judge knew that jurisdiction was exceeded before the applicability of judicial immunity may be decided. This, of course, violates that part of the doctrine which provides immunity to judges from the beginning of a case, without subjecting them to the burden of defending a lawsuit.

Therefore, it is respectfully submitted to this Court that this decision is in conflict with case law from the United States Supreme Court and other Circuit Courts of Appeals in the United States, and that it creates confusion as to the relevance of knowledge on the part of a judge that jurisdiction was exceeded. Accordingly, this issue needs to be addressed by the United States Supreme Court.

II.

The Second Circuit decision conflicts with *Bradley v. Fisher* and creates confusion as to the difference between excess and clear absence of jurisdiction

A general principle of the doctrine of judicial immunity is that a judge will be immune from civil liability for an act committed in excess of jurisdiction, but not for an act

committed in the clear absence of jurisdiction. See *Bradley v. Fisher, supra* at 351. Many courts have struggled with determining the difference between an act in excess of jurisdiction and an act in the clear absence of jurisdiction. An example given in the *Bradley* case has been widely used by courts throughout the United States as the basis for a test for determining the difference. See *Mullis v. U.S. Bankruptcy Ct.*, 828 F.2d 1385, 1389 (9th Circuit 1987), *cert. den.* 108 S. Ct. 2031 (1988) ; *Green v. Marario, supra* at 1017 (nt. 6); *Brewer v. Blackwell,* 692 F.2d 387, 396 (nt. 12) (5th Circuit 1982); *Lopez v. Vanderwater,* 620 F.2d 1229, 1233 (nt. 4) (7th Circuit 1980), *cert. den.* 449 U.S. 1028 (1980). In a footnote to the *Stump v. Sparkman* case, *supra,* the United States Supreme Court stated the following:

> "In *Bradley,* the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune." *Stump* at 357 (nt. 7).

This *Bradley* example, plus the statement in the *Stump v. Sparkman* case that, "the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge," *Stump* at 356, are the only guidance given to courts of the United States for determining the difference between excess and clear absence of jurisdiction.

It appears obvious that the point of the *Bradley* example is that when a judge acts within the general subject area of the judge's authority, immunity is granted. When a judge acts in an absurd or outrageous manner and completely departs from the general subject area of the judge's authority, however, no immunity is granted. The Second Circuit Court of Appeals in the case at bar has adopted a very technical analysis of subject matter jurisdiction and misconstrued the meaning of the *Bradley* example. The acts of petitioner underlying this lawsuit were acts he routinely performed as a town judge of the Town of Taghkanic. The charges against respondents were matters that petitioner customarily handled as a town judge. The allegation that petitioner exceeded his jurisdiction is based solely upon a territorial grant of authority. This mistake, if made, is far more analogous to the *Bradley* example of a criminal court judge convicting a defendant of a nonexisting crime than of a probate judge trying a criminal case, for petitioner did not depart from his given subject area of judicial authority. Perhaps if petitioner had been trying a divorce case in his court, for example, a subject area of law totally outside of his jurisdictional grant of authority, his act would then fall into the category of clear absence of jurisdiction. But a mere overreaching of territory while staying within one's general subject area should not be interpreted as an act in the clear absence of jurisdiction subjecting a judge to civil liability. "(O)nly a clearly inordinate exercise of unconferred jurisdiction by a judge . . . subjects him to personal liability." *Turner v. Raynes*, 611 F.2d 92, 95 (5th Circuit, 1980), *cert. den.* 449 U.S. 900 (1980).

It seems clear that subject matter jurisdiction, as discussed in judicial immunity cases, means the general area of expertise and authority of a judge. As defined by

Black's Law Dictionary, subject matter jurisdiction is the "court's competence to hear and determine cases of the general class to which proceedings in question belong; the power to deal with the general subject involved in the action" (Fifth Ed., 1278). While petitioner may have exceeded his territorial grant of authority, he was acting within the general subject area he customarily dealt with as a judge. Thus, the Second Circuit's very technical analysis of New York State subject matter jurisdiction as territorial is inappropriately used for determining the applicability of judicial immunity herein.

In addition, cases from the Circuit Courts of Appeals have deliberately avoided narrow and technical distinctions in interpreting the applicability of judicial immunity. In the case of *Adams v. McIlhany,* 764 F.2d 294 (5th Circuit 1985), *cert. den.* 474 U.S. 1101 (1986), the Fifth Circuit stated in a footnote that:

> "Accordingly, exceptions to judicial immunity based on narrow factual considerations, or technical or fine distinctions, must be avoided and those which exist should be as narrowly construed as reasonably possible." *Adams* at 297 (nt. 1).

This reasoning was adopted by the Ninth Circuit in the case of *Ashelman v. Pope, supra* at 1078. Thus, the Second Circuit has also strayed from existing precedential case law by developing a very technical analysis for determining the difference between acts in excess and acts in clear absence of jurisdiction, whereas other Circuit Courts of Appeals have determined that such an analysis is improper.

Thus, this decision in the case at bar misconstrues the *Bradley* example and conflicts with the Supreme Court's

guidance in the *Stump* case that jurisdiction be interpreted broadly. In addition, this case is in conflict with other Circuit Courts of Appeals in the United States with regard to its approach to determining the difference between acts in excess of jurisdiction and acts in the clear absence of jurisdiction. It is respectfully submitted to this Court that the courts of the United States need guidance for determining the difference between acts in excess of jurisdiction, wherein a judge is entitled to judicial immunity, and acts in the clear absence of jurisdiction, wherein a judge is not entitled to judicial immunity. In reality, the *Bradley v. Fisher* case of 1871 is still the only United States Supreme Court case that gives any substantial guidance for determining the difference. While the *Stump v. Sparkman* case of 1978 also extensively discussed judicial immunity, it relied upon the *Bradley* example for differentiating between acts in excess and acts in the clear absence of jurisdiction. More guidance is now needed, and this guidance could be given through the case at bar.

Conclusion

For the reasons set forth herein, it is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted this 19th day of December, 1988.

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Appendix A to Petition—Decision of Second Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1019 August Term, 1987
Argued: April 20, 1988 Decided: October 20, 1988

Docket No. 88-7060

ALDO MAESTRI and GLORIA ZOOK,

Plaintiffs-Appellants,

against

JOSEPH JUTKOFSKY, THE TOWN OF TAGHKANIC, THE STATE OF NEW YORK, THOMAS COLWELL, DOMINIC AQUILIO, Individually and as Officers of the New York State Police, and RALPH DEL POZZO, JR., and GORDON ZOOK,

Defendants,

JOSEPH JUTKOFSKY,

Defendant-Appellee.

Before:

Feinberg, *Chief Judge,* Lumbard, and Meskill, *Circuit Judges.*

Aldo Maestri and Gloria Zook appeal from a summary judgment entered in the Northern District, McAvoy, *Judge,* holding that Joseph Jutkofsky is entitled to judicial immunity to their civil rights action, which alleges that he had ordered, as a town justice of Taghkanic, New York, the arrest and detention of Maestri and Zook for alleged offenses committed in the town of Germantown, over which he had no jurisdiction.

Reversed.

Christopher Massaroni, Albany, New York (DeGraff, Foy, Conway, Holt-Harris & Mealey, Albany, New York, of counsel), for Plaintiffs-Appellants.

Roger J. Cusick, Albany, New York (Maynard, O'Connor & Smith, Albany, New York, of counsel), for Defendant-Appellee.

LUMBARD, *Circuit Judge:*

This appeal presents the question of whether a town justice may invoke the doctrine of judicial immunity as a defense against a suit alleging that he knowingly exercised authority outside his territorial jurisdiction. Aldo Maestri and Gloria Zook brought this action under 42 U.S.C. §§ 1983, 1985 and 1988 in the Northern District of New York, against Jutkofsky and other defendants. They allege that Jutkofsky, then a Town Justice of the the town of Taghkanic, New York,[1] ordered their arrest and deten-

[1] Jutkofsky was a town justice from 1977 until February 5, 1986, when the New York Court of Appeals permanently removed him

(Footnote continued on following page)

tion in May 1983 on charges of profanity that they allegedly had uttered in the town of Germantown. The complaint alleges that Jutkofsky, as a town justice of Taghkanic, had no authority over the town of Germantown. Judge McAvoy held that Jutkofsky is entitled to judicial immunity and granted summary judgment in his favor. We find that the allegations of Maestri's and Zook's complaint, if proven, show that Jutkofsky is not entitled to judicial immunity for issuing an arrest warrant for an offense committed in another town regarding which he had no jurisdiction.

I.

The relevant facts, which are for the most part undisputed and which we review in the light most favorable to Gloria Zook and Maestri, are as follows: Gordon Zook and his ex-wife Gloria Zook were engaged in litigation over the right to possession of property in Germantown, Columbia County. Gordon Zook, over Gloria Zook's objection, had authorized Ralph DelPozzo, Sr., a real estate broker who is also a town justice of Germantown, to sell the house. On April 17, 1983, when Gloria Zook and Maestri visited the premises, they saw Ralph DelPozzo, Jr., a salesman in his father's employ, showing the house to prospective purchasers. Gloria Zook exchanged words with DelPozzo, Jr. and the prospective purchasers, during which Gloria Zook and Maestri allegedly used profane language and accused DelPozzo, Jr. of trespassing.

(Footnote continued.)

from office. *In the Matter of Joseph Jutkofsky, Jr.*, N.Y. Ct. App., Feb. 5, 1986 (unpublished order). The New York State Commission on Judicial Conduct, in recommending Jutkofsky's removal, wrote that he "has repeatedly abused his judicial powers . . . [and] disregarded well-established, fundamental rights of defendants so as to create an appearance of bias and damage public confidence in the impartiality and integrity of the judiciary." In the Matter of Joseph Jutkofsky, Jr., Determination of the State of New York Commission on Judicial Conduct, Dec. 24, 1986, at 34.

On the same day, DelPozzo, Jr. signed and swore to complaints charging Gloria Zook and Aldo Maestri with harassment under N.Y. Penal Law § 240.25(5); Gordon Zook later signed a deposition in support of the criminal complaint against Gloria Zook and signed and swore to a complaint charging her with trespass under N.Y. Penal Law § 140.05. DelPozzo presented the complaints to Jutkofsky, town justice of the town of Taghkanic, which office he had held since 1977. Taghkanic is also in Columbia County but is several miles distant from, and does not adjoin, Germantown. Jutkofsky issued warrants for the arrest of Maestri and Gloria Zook on harassment charges and recommended that the arraigning judge set bail at $1,000 each.

Maestri and Zook were arrested in Saugerties, New York, on May 2, 1983 and taken to Livingston, where they were arraigned before Livingston Town Justice Robert Moore, who set bail at $500 each. When Maestri and Zook were unable to raise bail, Judge Moore remanded them to jail and ordered their appearance before Judge Jutkofsky in Taghkanic three days later. When Maestri and Zook were brought before Judge Jutkofsky in Taghkanic on May 5, he remanded them to await their first appearance in Germantown, where the alleged offense had occurred. The appearance in Germantown was set for May 18, thirteen days later, before Town Justice Robert Delaney.[2] When Maestri and Zook finally appeared before Judge Delaney on May 18, he ordered their release and dismissed the charges against them.

The parties do not dispute that Jutkofsky, as Town Justice of the town of Taghkanic, had no jurisdiction

[2]The record does not disclose any good reason for the thirteen day delay. In total, Maestri and Zook were incarcerated for sixteen days. New York law permits pretrial detention of only five days in the case of a violation, N.Y.C.P.L. § 30.30(2)(d), and a maximum prison sentence of fifteen days upon conviction of any one violation, N.Y. Penal Law § 10.00(3).

over a violation[3] occurring in Germantown. Jutkofsky has not alleged or argued, either in the district court or on appeal, that he did not know from the complaint papers that he was without jurisdiction to act on the complaints or to issue warrants for Maestri and Zook's arrests.

Under New York's Criminal Procedure Law, a town justice has jurisdiction to issue warrants of arrest and to preside over criminal charges constituting violations only in the town in which the offense was committed, except that if a town justice of the town in which the violation occurred is unavailable at the time that the complaint is sought to be filed and the warrant obtained, the complaint may be filed with the town court of any adjoining town within the same county. N.Y.C.P.L. §§ 100.55, 120.30(2). Very probably, DelPozzo, Jr. and Gordon Zook felt that it would be inappropriate to file in Germantown because DelPozzo, Sr. was a town justice of the town of Germantown. The complaints could then have been brought and the arrest warrants issued only in one of the two adjoining towns of Livingston and Clermont. Under no circumstances, however, would the town justice for Taghkanic have had any authority to act because the town of Taghkanic does not adjoin the town of Germantown. (The towns of Germantown and Taghkanic are nearly four miles distant at their closest points.)

On April 15, 1986, Maestri and Zook commenced this action in the Northern District, naming as defendants Jutkofsky, the town of Taghkanic, the State of New York, DelPozzo, Jr., Gordon Zook and two state police officers. In their amended complaint, filed on April 30, 1986, Maestri and Zook alleged that the defendants, acting under color of state law, conspired to, and thereafter did, deprive them of their rights, privileges and immu-

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[3]A violation under New York law is "an offense, other than a [traffic infraction], for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed." N.Y. Penal Law § 10.00(3).

nities under state and federal laws and constitutions. Jutkofsky answered on July 21, 1986, denying substantially all of Maestri and Zook's allegations and presenting several affirmative defenses including that of judicial immunity. Finally, Jutkofsky moved for summary judgment on the grounds of judicial immunity on September 8, 1987. The motion was argued before Judge McAvoy on December 14, 1987, and he granted summary judgment in Jutkofsky's favor on December 17.

II.

The principle of judicial immunity is well established. The Supreme Court as early as 1872 recognized the common law doctrine, writing in *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1871), that it is "of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347. This judicial immunity doctrine, recently reaffirmed in *Stump v. Sparkman,* 435 U.S. 349 (1978), protects judges from civil actions even when they perform judicial acts in excess of their authority, even when such acts are allegedly done maliciously or corruptly. *Stump v. Sparkman, supra,* at 355-56 (citing *Bradley v. Fisher, supra,* at 351). The courts, however, have made a critical distinction: a judge who performs a judicial act in excess of his or her jurisdiction is immune to civil suit; a judge who acts in the clear absence of jurisdiction is not. When a judge clearly lacks jurisdiction over the subject matter, "any authority exercised is a usurped authority." *Bradley v. Fisher, supra,* at 351-52. The question, therefore, is whether Jutkofsky acted in the clear absence of jurisdiction when he entertained complaints and issued arrest warrants when the al-

leged misconduct occurred in a town over which he necessarily and obviously knew he had no jurisdiction.

The Supreme Court in *Bradley* described the difference between "excess of jurisdiction" and "clear absence of all jurisdiction" by example: If a probate court, the jurisdiction of which is limited to wills and estate settlement, should conduct a criminal trial, jurisdiction over the subject matter would be entirely wanting, and, as this lack would necessarily be known to the court, the judge would not be entitled to judicial immunity. If, on the other hand, a judge of a criminal court were to try a party for a nonexistent offense or sentence a convict to a term longer than that permitted by law, that judge would be entitled to the protection of the judicial immunity doctrine since those acts would be "particulars for his judicial consideration." *Id.* at 351; *see also Stump v. Sparkman, supra,* at 357 n.7. This distinction has been utilized to aid in the determination of whether judicial immunity should obtain, with "the scope of the judge's jurisdiction [to be] construed broadly." *Stump v. Sparkman, supra,* at 356. *See, e.g., id.* at 357 (state circuit judge with general jurisdiction was immune to suit alleging absence of jurisdiction to authorize sterilization of a minor); *Heimbach v. Village of Lyons,* 597 F.2d 344 (2d Cir. 1979) (maliciously issued arrest warrant does not subject a judge of a criminal court to loss of immunity).

Because scrutiny of a judge's state of mind would hinder the adjudicatory process in the very manner that the judicial immunity doctrine is designed to prevent, a judge will be denied immunity only where it appears, first, that the judge acted in the clear absence of jurisdiction, and second, the judge must have known that he or she was acting in the clear absence of jurisdiction. This test, composed both of an objective element—that jurisdiction is clearly absent, *i.e.*, that no reasonable judge would have thought jurisdiction proper—and of a subjective

element—that the judge whose actions are questioned actually knew or must have known of the jurisdictional defect—protects judicial acts from hindsight examination while permitting redress in more egregious cases, such as where a judge knowingly acts outside his territorial jurisdiction.

On the facts which we take to be undisputed, we find that Jutkofsky knowingly acted in the clear absence of territorial jurisdiction when he signed the arrest warrants and caused the incarceration of Maestri and Zook. No reasonable town judge would have thought himself to have had jurisdiction over a non-adjoining town. Jutkofsky thus acted unreasonably when he entertained DelPozzo, Jr.'s complaints. As for Jutkofsky's awareness of the extent of his authority, it is undisputed that he knew that the incident at the Zooks' house occurred in Germantown and that he knew that he lacked subject matter jurisdiction over offenses occurring in Germantown. Moreover, Jutkofsky's counsel, in response to a direct question at oral argument, was willing to concede *arguendo* that Jutkofsky knew that he had no jurisdiction over a violation occurring in Germantown. Finally, Jutkofsky has not cited, nor have we found, any case in which a judge who had exercised authority outside the territory properly within his jurisdiction was nevertheless held to be entitled to judicial immunity.

For a judge to assume authority outside the geographic bounds of his office is the kind of clear judicial usurpation which cannot be condoned by any grant of immunity. No public policy would be served by granting immunity for such arrogant excesses of authority.

We reverse the judgment of the district court and remand the case for further proceedings.

Appendix B to Petition—Order of Judge McAvoy.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

ALDO MAESTRI and GLORIA ZOOK,

Plaintiffs,

against

JOSEPH JUTKOFSKY, THE TOWN OF TAGHKANIC, THE STATE OF NEW YORK, THOMAS COLWELL and DOMINIC AQUILIO, Individually and as Officers of the NEW YORK STATE POLICE, and RALPH DEL POZZO, JR., and GORDON ZOOK,

Defendants.

JOSEPH JUTKOFSKY,

Third-Party Plaintiff,

against

COUNTY OF COLUMBIA,

Third-Party Defendant.

86-CV-412

The defendant, Joseph Jutkofsky, having duly moved this Court for an Order of summary judgment pursuant to Rule 56 of Federal Rules of Civil Procedure and said motion having duly come on to be heard.

NOW, upon reading and filing herein the Notice of Motion of the defendant, Joseph Jutkofsky, dated September 4, 1987, the supporting affidavit of Joseph Jutkofsky, sworn to the 31st day of August, 1987, the supporting affidavit of Roger J. Cusick, sworn to the 4th day of September, 1987, and the opposition of the various other parties, and due deliberation having been had therein,

ORDERED, that the motion of the defendant, Joseph Jutkofsky be and the same is hereby granted and the action, the claims of the plaintiffs, and all cross-claims against defendant, Joseph Jutkofsky, be and the same hereby are dismissed on the merits upon the grounds that all acts committed by said defendant, Joseph Jutkofsky, in the context of this action were judicial acts governed by the Doctrine of Judicial Immunity.

THOMAS J. McAVOY
U.S. District Court Judge

ENTER: 12/17/87

U. S. DISTRICT COURT
N.D. OF N.Y.
FILED
DEC. 17, 1987

Appendix C to Petition—Order for Final Judgment of Judge McAvoy.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

ALDO MAESTRI and GLORIA ZOOK,

Plaintiffs,

against

JOSEPH JUTKOFSKY, THE TOWN OF TAGHKANIC, THE STATE OF NEW YORK, THOMAS COLWELL and DOMINIC AQUILIO, Individually and as Officers of the NEW YORK STATE POLICE, and RALPH DEL POZZO, JR., and GORDON ZOOK,

Defendants.

No. 86-CV-412

On the prior Order of this Court dated December 17, 1987, and entered December 17, 1987, it appearing to the Court that there is no just reason for delay in entering final judgment on plaintiffs' claims against defendant, Joseph Jutkofsky, it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

ORDERED that final judgment be entered herein dismissing plaintiffs' claims against defendant, Joseph Jutkofsky.

DATED: January 6, 1988

HON. THOMAS J. McAVOY
U.S. District Judge

U. S. DISTRICT COURT
K.D. OF N.Y.
FILED
JAN. 8, 1988

Appendix D to Petition—Statutes.

28 U.S.C. Section 1254(1)

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

42 U.S.C. Section 1983.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Section 1985.

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or

to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privilages. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. Section 1988.

§1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to

furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

N. Y. Criminal Procedure Law Section 100.55.

§ 100.55. Local criminal court accusatory instruments; in what courts filed

1. Any local criminal court accusatory instrument may be filed with a district court of a particular county when an offense charged therein was allegedly committed in such county or that part thereof over which such court has jurisdiction.

2. Any local criminal court accusatory instrument may be filed with the New York City criminal court when an offense charged therein was allegedly committed in New York City.

3. Any local criminal court accusatory instrument may be filed with a city court of a particular city when an offense charged therein was allegedly committed in such city.

4. An information, a simplified information, a prosecutor's information or a misdemeanor complaint may be filed with a town court of a particular town when an offense charged therein was allegedly committed anywhere in such town other than in a village thereof having a village court.

5. An information, a simplified information, a prosecutor's information or a misdemeanor complaint may be filed with a village court of a particular village when an offense charged therein was allegedly committed in such village.

6. A felony complaint may be filed with any town court or village court of a particular county when a felony charged therein was allegedly committed in some town of such county. Such court need not be that of the town or village in which such felony was allegedly committed.

7. An information, a simplified information, a misdemeanor complaint or a felony complaint may be filed with a judge of a superior court sitting as a local criminal court when an offense charged therein was allegedly commit-

ted in a county in which such judge is then present and in which he either resides or is currently holding, or has been assigned to hold, a term of a superior court.

8. Where it is otherwise expressly provided by law that a particular kind of accusatory instrument may under given circumstances be filed with a local criminal court other than one authorized by this section, nothing contained in this section precludes the filing of such accusatory instrument accordingly.

9. In any case where each of two or more local criminal courts is authorized as a proper court with which to file an accusatory instrument, such an instrument may, in the absence of an express provision of law to the contrary, be filed with any one of such courts but not with more than one.

10. For purposes of this section, an offense is "committed in" a particular county, city, town, village or other specified political subdivision or area, not only when it is in fact committed therein but also when it is, for other reasons specified in sections 20.40 and 20.50, prosecutable in the criminal courts having geographical jurisdiction over such political subdivision or area.

N. Y. Criminal Procedure Law Section 120.30.

§ 120.30 Warrant of arrest; by what courts issuable and in what courts returnable

1. A warrant of arrest may be issued only by the local criminal court with which the underlying accusatory instrument has been filed, and it may be made returnable in such issuing court only.

2. The particular local criminal court or courts with which any particular local criminal court accusatory instrument may be filed for the purpose of obtaining a warrant of arrest are determined, generally, by the provisions of section 100.55. If, however, a particular accusatory instrument may pursuant to said section 100.55 be filed with a particular town court and such town court is not available at the time such instrument is sought to be filed and a warrant obtained, such accusatory instrument may be filed with the town court of any adjoining town of the same county. If such instrument may be filed pursuant to said section 100.55 with a particular village court and such village court is not available at the time, it may be filed with the town court of the town embracing such village, or if such town court is not available either, with the town court of any adjoining town of the same county.

N. Y. Criminal Procedure Law Section 170.55.

§ 170.55. Adjournment in contemplation of dismissal

1. Upon or after arraignment in a local criminal court upon an information, a simplified information, a prosecutor's information or a misdemeanor

complaint, and before entry of a plea of guilty thereto or commencement of a trial thereof, the court may, upon motion of the people or the defendant and with the consent of the other party, or upon the court's own motion with the consent of both the people and the defendant, order that the action be "adjourned in contemplation of dismissal," as prescribed in subdivision two.

2. An adjournment in contemplation of dismissal is an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice. Upon issuing such an order, the court must release the defendant on his own recognizance. Upon application of the people, made at any time not more than six months after the issuance of such order, the court may restore the case to the calendar upon a determination that dismissal of the accusatory instrument would not be in furtherance of justice, and the action must thereupon proceed. If the case is not so restored within such six months period, the accusatory instrument is, at the expiration of such period, deemed to have been dismissed by the court in furtherance of justice.

3. In conjunction with an adjournment in contemplation of dismissal the court may issue a temporary order of protection pursuant to section 530.12 or 530.13 of this chapter, requiring the defendant to observe certain specified conditions of conduct.

4. The court may grant an adjournment in contemplation of dismissal on condition that the defendant participate in dispute resolution and comply with any award or settlement resulting therefrom.

5. The court may as a condition of an adjournment in contemplation of dismissal order, require the defendant to perform services for a public or not-for-profit corporation, association, institution or agency. Such condition may only be imposed where the defendant has consented to the amount and conditions of such service. The court may not impose such conditions in excess of the length of the adjournment.

6. The granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant to this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.

N. Y. Penal Law Section 140.05.

§ 140.05. Trespass

A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises.

Trespass is a violation.

N. Y. Penal Law Section 240.25.

§ 240.25. Harassment

A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

1. He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or

2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or

3. He follows a person in or about a public place or places; or

4. As a student in school, college or other institution of learning, he engages in conduct commonly called hazing; or

5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Harassment is a violation.